No. 339

CHARLES ELMORE CROPL
CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

IN THE MATTER OF THE PETITION OF LEE KAMEN,
FOR A WRIT OF HABEAS CORPUS,
PETITIONER,

v.

ROBERT GRAY, SHERIFF OF SEDGWICK COUNTY, KANSAS,
RESPONDENT.

PROCEEDINGS IN HABEAS CORPUS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND BRIEF IN SUPPORT THEREOF.

MARK H. ADAMS,
A. D. WEISKIRCH,
MANFORD HOLLY,
WILLIAM C. FARMER,
LEONARD LEVAND,
of Wichita, Kansas,
Attorneys for Petitioner.

To the Honorable Fred M. Vincent, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

IN THE MATTER OF THE PETITION OF LEE KAMEN,
FOR A WRIT OF HABEAS CORPUS,
PETITIONER,

v.

ROBERT GRAY, SHERIFF OF SEDGWICK COUNTY, KANSAS,
RESPONDENT.

ORIGINAL PROCEEDINGS IN HABEAS CORPUS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Fred M. Vincent, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States.

PETITION FOR WRIT OF CERTIORARI.

IF THE COURT PLEASE:

The petitioner, hereinafter referred to for the sake of clarity as defendant, petitions this honorable Court for a writ of certiorari in the above entitled cause to the Supreme Court of the State of Kansas.

SUMMARY STATEMENT OF MATTER INVOLVED.

The instant action involves a question of the right of the State of Kansas to subject the defendant for the same offense to be twice put in jeopardy of life or limb, under the constitutional guarantee provided by the Fifth Amendment to the Constitution of the United States and Section 10 of the Bill of Rights of the Constitution of the State of Kansas.

On May 9, 1949, the defendant, having had a preliminary hearing, upon a complaint and warrant issued out of the City Court of Wichita, Sedgwick County, Kansas, was bound over to the District Court of Sedgwick County, Kansas, upor a felony charge of receiving stolen property over the value of $[illegible]0.00 knowing the same to have been stolen.

An information was filed in the District Court of Sedgwick County, Kansas, attempting to charge the crime aforesaid and upon motion of the defendant it was quashed upon the ground that it did not state facts sufficient to constitute an offense against the laws of the State of Kansas.

Subsequently an amended information was filed and likewise upon motion of the defendant it was quashed upon the same grounds heretofore stated.

On December 23, 1949, a second amended information was filed and the defendant's motion to quash same was overruled ~~November 29, 1949~~ JAN. 13, 1950. The second amended information is as follows:

"IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

The State of Kansas, Plaintiff,	)	
vs.	)	Case A-29287
LEE KAMEN, Defendant	)	Div. No. 4

SECOND AMENDED INFORMATION

COMES NOW JOHNIE FRANK, the duly elected, qualified and acting County Attorney in and for the County of Sedgwick and State of Kansas, and for and on behalf of said State, gives the court to understand and be informed that in the County of Sedgwick and State of Kansas, and on or about the 30th day of March, A. D. 1948, one LEE KAMEN did then and there unlawfully, feloniously, wilfully buy and receive personal property, to-wit: two skids of new zinc bond sheet steel, 25-gauge, weighing a total of approximately 11,000 pounds, and each skid being 9 feet long, 2 2/3 feet wide and 5 inches thick, a more particular description of which informant is not now able to give, said personal property being over the value of Twenty Dollars ($20.00), that had been stolen from another, The Coleman Company, Inc., knowing the same to have been stolen; all of said acts then and there committed being intentional, unlawful, felonious and willful and being contrary to the statutes in such cases made and provided and being against the peace and dignity of the State of Kansas.

Sec. 21-549, 1935 G. S. K.

.....
County Attorney

STATE OF KANSAS, SEDGWICK COUNTY, SS:

JOHNIE FRANK, County Attorney within and for said County and State, being by me first duly sworn, says that he has read the above and foregoing information and knows the contents thereof, and that the same is true in substance and in fact to his best information and belief.

.....
COUNTY ATTORNEY

SUBSCRIBED and sworn to before me this 2nd day of December, 1949.

.....
Clerk of the District Court

STATE WITNESSES:

J. H. Reeves, G. G. Friesen, Don Hall, Vern Miller, W. P. D.;
H. D. Burke, c/o Coleman Co., Inc.;
Arsene Easley, c/o Coleman Co., Inc.;
Floyd Quinlisk, c/o Coleman Co., Inc.;
Lewis R. Meadows, 601 N. Green;
Arnold Mark, 5605 W. Maple; Christie Higbee, 326 S. Elizabeth.
Lotus Helm, c/o The Coleman Company, Inc.;
Phyllis Leslie, c/o The Coleman Company, Inc.;
Alfred Keeler, c/o The Coleman Company, Inc.;
Carl Mercer, c/o The Coleman Company, Inc.;"

On January 16, 1950, the defendant appeared for trial in the District Court of Sedgwick County, Kansas, upon the aforesaid second amended information and after waiving arraignment and entering a plea of not guilty a jury was duly empanelled and sworn to try the cause.

The State introduced its evidence and rested and thereupon defendant moved the Court to direct the jury to

return a verdict of not guilty and to discharge the defendant for the reason that the State failed to prove the allegations alleged in said second amended information.

During the argument of said motion for a directed verdict and discharge the Court, on January 19, 1950, declared a mistrial upon no ground provided by statute nor law, discharged the jury from further consideration of the case and ordered the State to file a new and third amended information.

Thereafter and on the 3rd day of March, 1950, the State filed its third amended information, to-wit:

"IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

The State of Kansas, Plaintiff,)
vs.)Case No. A-29287
LEE KAMEN, Defendant.) Div. No. 4

THIRD AMENDED INFORMATION

COMES NOW JOHNIE FRANK, the duly elected, qualified and acting County Attorney in and for the County of Sedgwick and State of Kansas, and for and on behalf of said State, gives the court to understand and be informed that in the County of Sedgwick and State of Kansas, and on or about the 30th day of March, A. D. 1948, one LEE KAMEN did then and there unlawfully, feloniously, wilfully buy and receive personal property, to-wit: two skids of new zinc bond sheet steel, 25-gauge, weighing a total of approximately 11,000 pounds, and each skid being 9 feet long, 2 2/3 feet wide and 5 inches thick, said personal property being over the value of Twenty Dollars ($20.00), that had been stolen from another, The Coleman Company, Inc., knowing

the same to have been stolen; all of said acts then and there committed being intentional, unlawful, felonious and willful and being contrary to the statutes in such cases made and provided and being against the peace and dignity of the State of Kansas.

(Sec. 21-549, 1935 G. S. K.

JOHNIE FRANK
County Attorney

STATE OF KANSAS, SEDGWICK COUNTY, SS:

JOHNIE FRANK, County Attorney within and for said County and State, being by me first duly sworn, says that he has read the above and foregoing Information and knows the contents thereof, and that the same is true in substance and in fact to his best information and belief.

JOHNIE FRANK
County Attorney

SUBSCRIBED and sworn to before me this 10th day of March, 1950.

BETTY BOMAR, Deputy
Clerk of the District Court

STATE WITNESSES:

J. H. Reeves, G. G. Friesen, Don Hall, Vern Miller, Wichita Police Department;
H. D. Burke, c/o Coleman Co., Inc.;
Arsene Easley, c/o Coleman Co., Inc.;
Floyd Quinlisk, c/o Coleman Co., Inc.;
Lewis R. Meadows, 601 No. Green;
Arnold Mark, 5605 W. Maple
Christie Higbee, 326 S. Elizabeth
Lotus Helm, c/o The Coleman Company, Inc.;
Phyllis Leslie, c/o The Coleman Company, Inc.;
Alfred Keeler, c/o The Coleman Company, Inc.;

Carl Mercer, c/o The Coleman Company, Inc.;
Fern Smith, 2721 W. 3rd St., Wichita, Kansas
W. C. Coleman, c/o The Coleman Co., Inc."

To said third amended information the defendant on the 4th day of April, 1950, filed the following motion to quash and a plea in bar, to-wit:

"IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

THE STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. A-29287
LEE KAMEN, Defendant.	)	

MOTION TO QUASH PLAINTIFF'S THIRD AMENDED INFORMATION

COMES NOW the defendant and moves the Court to quash the plaintiff's third amended information herein filed on or about the 10th day of March, 1950 for the reason that the facts stated therein do not constitute a public offense.

LEONARD LEVAND
WEISKIRCH & HOLLY
By .....
Attorneys for Defendant."

"IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

THE STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. A-29287
LEE KAMEN, Defendant.	)	

PLEA IN BAR

COMES NOW the defendant and moves the Court to bar prosecution in the above entitled cause for the reason that he was formerly in jeopardy on the identical charge contained in the third amended information filed and now pending in this cause.

LEONARD LEVAND
WEISKIRCH & HOLLY
By .....
Attorneys for Defendant."

Said above motion to quash the third amended information and the plea in bar have not been presented to the trial court for the reason that the defendant elected to proceed in an original proceeding in habeas corpus in the Supreme Court of the State of Kansas.

Following are the pleadings filed in the Supreme Court of the State of Kansas, number 38044, in the matter of the petition of Lee Kamen for a writ of habeas corpus, petitioner vs. Robert Gray, Sheriff of Sedgwick County, Kansas, respondent, in original proceedings in habeas corpus. Said pleadings have omitted the exhibits attached thereto for the reason that the exhibits are without import herein, and the captions are likewise omitted.

"PETITION

STATE OF KANSAS)
) SS:
SEDGWICK COUNTY)

TO The Honorable Supreme Court of the State of Kansas.

Your petitioner, Lee Kamen, respectfully represents and shows to the Court that he is unlawfully

deprived of his liberty by Robert Gray, Sheriff of Sedgwick County, Kansas, at the County Jail, Wichita, Kansas, and that the cause or pretense of his restraint, according to his best knowledge and belief, is as follows:

Upon a complaint and warrant issued out of the City Court of Wichita, Sedgwick County, Kansas, a preliminary hearing was had before the City Court of Wichita on May 9, 1949, and the petitioner, the defendant, was bound over for receiving stolen property. Subsequently an information was filed in the District Court of Sedgwick County, Kansas and, upon motion of the defendant, it was quashed. Then an amended information was filed and, upon motion of the defendant, it was quashed. Then, on December 23, 1949, a second amended information was filed and a motion to quash same was overruled November 29, 1949.

The second amended information charged, in substance that on or about the 30th day of March, 1948, Lee Kamen did then and there unlawfully, feloniously and wilfully buy and receive personal property, to-wit:

> Two skids of new zinc bond sheet steel, 25 gauge, weighing a total of approximately 11,000 pounds, and each skid being 9 inches long, 2 2/3 inches wide and 5 inches thick, a more particular description of which informant is not now able to give,

said personal property being over the value of Twenty Dollars ($20.00), that had been stolen from another, The Coleman Company, Inc., knowing the same to have been stolen, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Kansas. Said information was duly verified by Johnie Frank, County Attorney.

January 16, 1950 the defendant appeared for trial in the District Court of Sedgwick County, Kansas, before the Honorable Ross McCormick, Judge. After waiving arraignment and entering a plea of not guilty, a jury was duly impanelled and sworn to try the cause. The plaintiff introduced its evidence and rested and thereupon defendant moved the Court to direct the jury to return a verdict of not guilty and to discharge the defendant for the reason that the State failed to prove the allegations and averments alleged in the second amended information filed in this cause.

During the argument of said motion for a directed verdict and discharge, the Court, on January 19, 1950, declared a mistrial, discharged the jury and required the State to file a new information.

The Court, when being requested to make a record of the grounds upon which the mistrial was declared, stated:

> "Oh, there is so much prejudicial error went to the jury with respect to Exhibit 12 and there are some details of the defendant's complaint that are substantial. In the first place it was prompted by the defense itself in asking the policeman to go down and get his report and then he was examined when he returned and these is remarks about the policeman's testimony and character. Then was the evidence of an altered instrument and it hints at perjured evidence and taking it all and all it is a question of whether it is justice or not and, for that reason I am granting a mistrial and ordering a new information be filed and the case will be tried in the April Term. So get ready for the April Term of Court.
>
> Bring down the jury.
>
> (Jury brought into court at 10:35 A. M.)

THE COURT: Good morning, ladies and gentlemen of the jury. I have relieved you all of a big headache, I am granting a new trial in this case, I am declaring a mistrial because of errors which have come into the record before you and I don't want you passing on the merits of the case, so, I am not sending it to you as a jury, I am discharging you from further attendance on the trial of this case, but don't talk to anybody about this case because it is not finished as yet and don't allow anybody to pry out of you any informaton about this case. You man now return to your general jury room." (T-69-70)

The State rested its case Wednesday evening, January 18, 1950 and after the motion for a directed verdict and for discharge was interposed on the morning of Thursday, January 19, 1950, the Court made other statements that, for the purpose of the record, are included, to-wit:

"THE COURT: Plenty of evidence went to the jury which was incompetent from both sides, on cross examination and on direct examination. And I will repeat, since the reporter is taking it down, Mistakes were made on both sides, by the State's and by the Defendant's attorney. In the first place the State's attorneys made a mistake in allowing this matter to drag on two years. You can't do that and the same rule applies to both sides. You cannot delay and then benefit by the delay. So, I have really come to the conclusion of what ought to be done in this case and I am about to state it. Here we have eminent citizens of this State on both sides. And, if a trial is to be had and if a conviction is to be had it ought to be right. I am declaring a mistrial and that ends the trial of this case. Now, then, but

I am also required and will require a new information totally, so that there will be no further mixing up on it. If the defense has any objection." (T-68-69)

Subsequent to the Court declaring a mistrial, the defendant surrendered himself to the Sheriff of Sedgwick County, Kansas, where he is now in custody.

Upon the allegations hereinabove set forth, the Court, in declaring a mistrial, acquitted the defendant as a matter of law, hence the defendant is being unlawfully deprived of his liberty in violation of:

1. The Fifth Amendment to the Constitution of the United States;
2. The Fourteenth Amendment to the Constitution of the United States;
3. Section 10 of the Bill of Rights;
4. In violation of the laws of the State of Kansas.

Under the laws of the State of Kansas, when a trial has been commenced before a Court of competent jurisdiction, upon an information sufficient to sustain a conviction, and jeopardy has attached and there has been a discontinuance of the trial without the consent of the accused or an absolute necessity or for any reason other than one provided in Section 60-2914 of the General Statutes of 1935, the defendant cannot again be placed in jeopardy and tried upon the same information for the same offense.

WHEREFORE your petitioner prays that a writ of habeas corpus may be issued and that he may be discharged from his unlawful imprisonment.

WEISKIRCH & HOLLY
By .....
Attorneys for Petitioner."

"ANSWER AND RETURN OF RESPONDENT

Comes now the above named respondent and for his answer and return to the petition for writ of habeas corpus filed herein, alleges and states:

I.

That except as may be hereinafter explained or admitted, respondent specifically denies each and every, all and singular, the allegations, statements and averments contained in said petition for a writ of habeas corpus.

II.

That petitioner on May 9, 1949, was bound over for trial on the charge of receiving stolen property, contrary to G.S.K. 1935 21-549, after a preliminary hearing was had upon a complaint and warrant issued out of the City Court of Wichita, Sedgwick County, Kansas; that on December 23, 1949, a second amended information was filed in said cause, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof by reference the same as if fully set out herein.

That the petitioner waived arraignment on said second amended information, entered a plea of not guilty and appeared for trial in the District Court of Sedgwick County, Kansas, Division 1; that a jury was duly impaneled and sworn to try the cause. The plaintiff (State) introduced its evidence and at the close of the plaintiff's evidence, the defendant (petitioner), by his attorney, A. D. Weiskirch, moved and asked the Court to declare a mistrial of the case.

That immediately thereafter the State rested its case and the defendant (petitioner) moved the Court

to direct the jury to return a verdict of not guilty and to discharge the defendant, on the grounds that the State failed to prove the allegations and averments alleged in the second amended information filed in said case.

That during the argument of said motion for a directed verdict and on January 19, 1950, the defendant, by A. D. Weiskirch, his attorney, again asked the Court to declare a mistrial of said case.

That on January 19, 1950, the Court declared a mistrial and ordered the State to file a new information and thereafter asked if the defense had any objection; that the defense made no objection and the defendant, by his attorney, A. D. Weiskirch, consented to the ruling by stating, "We will even assist them, if they want us to, in the description of the property."

That thereafter on the 10th day of March, 1950, a new information was filed in said cause, a copy of which is hereto attached, marked Exhibit "B", and made a part hereof by reference the same as if fully set out herein.

That the action of the Court in declaring a mistrial was based upon the motions of the petitioner and was done with his consent and upon his special instance and request.

III.

That the petitioner is duly and legally confined in the custody of the respondent under the warrant heretofore issued in said cause, a copy of which is hereto attached, marked Exhibit "C", and made a part hereof by reference the same as if fully set out herein, and that petitioner was granted a mistrial at his own instigation, request and instance and by his own consent, and that petitioner is not

entitled in law or in fact to a writ of habeas corpus in this proceeding.

WHEREFORE, respondent prays that a writ of habeas corpus be not issued in this proceeding, and that the same be dismissed.

HAROLD R. FATZER,
Attorney General.
C. HAROLD HUGHES,
Assistant Attorney General.
JOHNIE FRANK,
County Attorney,
Sedgwick County, Kansas.
A. MARTIN MILLARD,
Deputy County Attorney,
Sedgwick County, Kansas.
EUGENE COOMBS,
Special Prosecutor."

"REPLY TO ANSWER AND RETURN OF RESPONDENT

COMES NOW the petitioner, Lee Kamen, and in reply to the answer and return of respondent, Robert Gray, Sheriff of Sedgwick County, Kansas, states and alleges:

I.

Petitioner denies each and every, all and singular, the allegations, averments and statements set forth in respondent's answer and return except such allegations, averments and statements as are hereinafter admitted.

II.

Petitioner admits that on May 9, 1949 he was bound over for trial on the charge of receiving stolen property contrary to G. S. 1935, 21-549 after

a preliminary hearing was had upon a complaint and warrant issued out of the City Court of Wichita, Sedgwick County, Kansas. That on December 23, 1949, a second amended information was filed in said cause, a copy of which is attached as Exhibit "A" to respondent's answer and return. That petitioner waived arraignment on the second amended information, entered a plea of not guilty and appeared for trial in the District Court of Sedgwick County, Kansas, in Division one thereof; that a jury was duly empanelled and sworn to try the cause; that the State introduced its evidence and during the introduction thereof petitioner moved the Court to declare a mistrial. That thereafter and on January 18, 1950 the State did rest and petitioner moved the Court to direct the jury to return a verdict of not guilty and to discharge the defendant on the ground that the State failed to prove the allegations and averments alleged in the second amended information filed in the cause. That on January 19, 1950 the Court declared a mistrial and ordered the State to file a new information. That subsequently and on March 10, 1950 the State filed its new information, a copy of which, marked Exhibit "B", is attached to respondent's answer and return. That the petitioner was confined in the custody of the respondent under a warrant, a copy of which is marked Exhibit "C" and is made a part of respondent's answer and return.

III.

Further replying, petitioner specifically denies that the petitioner moved the Court to declare a mistrial at the close of the plaintiff's case, but alleges that petitioner moved the Court to declare a mistrial before the State rested and said motion was thereupon by the Court overruled, as indicated by the transcript of the record made in this cause.

IV.

Further replying the petitioner informs the Court that the transcript of the record does not disclose that during the argument of petitioner's motion for a directed verdict and on January 19, 1950 the defendant, by his attorney, again asked the Court to declare a mistrial as alleged in the 4th subsection of paragraph II of the respondent's answer and return.

V.

Petitioner specifically denies the allegation, to-wit:

> "That on January 19, 1950, the Court declared a mistrial and ordered the State to file a new information and thereafter asked if the defense had any objection; that the defense made no objection and the defendant, by his attorney, A. D. Weiskirch, consented to the ruling by stating, 'We will even assist them, if they want us to, in the description of the property.' "

set forth in sub-paragraph five of paragraph II of respondent's answer and return and informs the Court that the transcript of the record discloses that on January 19, 1950 the Court, after some colloquy, stated:

> "I am declaring a mistrial and that ends the trial of this case."

After the above quoted declaration by the Court, the Court then said:

> "Now, then, but I am also required and will require a new information totally, so that there will be no further mixing up on it. If the defense has any objection?"

It was at this point that counsel for the defendant said:

> "We will even assist them if they want us to in the description of the property."

and petitioner informs the Court that said remark of counsel referred solely and only to the Court's remark requiring a new information to be filed.

VI.

Petitioner further replying affirmatively informs the Court that the trial Court did not declare a mistrial upon motion of the petitioner but, as indicated by the transcript of the record, declared a mistrial upon the grounds hereinafter set forth in the record, to-wit:

"MR. COOMBS: On what ground is a mistrial being declared?

THE COURT: Oh, there is so much prejudicial error went to the jury with respect to Exhibit 12 and there are some details of the defendant's complaint that are substantial. In the first place it was prompted by the defense itself in asking the policeman to go down and get his report and then he was examined when he returned and these is remarks about the policeman's testimony and character. Then was the evidence of an altered instrument and it hints at perjured evidence and taking it all and all it is a question of whether it is justice or not and, for that reason I am granting a mistrial and ordering a new information be filed and the case will be tried in the April Term. So get ready for the April Term of Court.

Bring down the jury."

WHEREFORE, petitioner prays for relief as heretofore prayed for in his petition.

LEONARD LEVAND
WEISKIRCH & HOLLY
By .....
Attorneys for Petitioner

STATE OF KANSAS)
) SS:
SEDGWICK COUNTY)

I, LEE KAMEN, do solemnly swear:

That I am the petitioner above named; that I have read the above and foregoing Reply to the Respondent's Answer and Return; that I know the contents thereof and that the same is true and correct.

.....
LEE KAMEN

SUBSCRIBED and sworn to before me this ..... day of March, 1950.

.....
Notary Public

My Commission Expires:
.....

After briefing and orally arguing the matter in the Supreme Court of the State of Kansas, the Court, in a divided opinion, denied the defendant's petition for writ of habeas corpus July 8, 1950, in the following opinion:

"No. 38,044

In the Matter of the Petition of LEE KAMEN, for a Writ of Habeas Corpus, *Petitioner,*

v.

Robert Gray, Sheriff of Sedgwick County, Kansas, *Respondent.*

SYLLABUS BY THE COURT

Petitioner was charged with receiving stolen property. In the trial in the district court, after a jury had been empanelled and sworn and evidence of the state was introduced, the defendant moved the Court

to declare a mistrial because of error and prejudice engendered in the minds of the jury by the admission of certain specified evidence, which motion was overruled. The state then rested its case, and defendant moved the court for a directed verdict of not guilty for the reason that the state had failed to prove the allegations of the information. After some argument on the latter motion, the court on its own motion reversed its former ruling and declared a mistrial on the grounds set forth in defendant's original motion for declaration of a mistrial. On habeas corpus proceedings in this court, it is held: Defendant cannot thereafter plead former jeopardy when placed on trial on an amended information for the same offense, having requested and consented, by his former action, to waiver of his constitutional privilege.

Original proceedings in habeas corpus. Opinion filed July 8, 1950. Writ denied.

A. D. Weiskirch, of Wichita, argued the cause, and *Manford Holly, William C. Farmer* and *Leonard Levand,* also of Wichita, were with him on the briefs for the petitioner.

Eugene G. Coombs, of Wichita, argued the cause, and *Harold R. Fatzer,* attorney general, *C. Harold Hughes,* assistant attorney general, *Johnie Frank,* County Attorney, and *A. Martin Millard,* deputy county attorney, were with him on the briefs for the respondent.

The opinion of the court was delivered by

WERTZ, J.: This is an original proceeding in habeas corpus. Lee Kamen, petitioner, seeks to be discharged from the custody of respondent sheriff, by whom he is detained awaiting trial on a criminal charge. He claims that his imprisonment is unlawful and that he is being deprived of his liberty in violation of federal and state constitutions and laws.

The following proceedings were had in the district court of Sedgwick county, prior to institution of these proceedings in habeas corpus. Petitioner, defendant below, was—after a preliminary hearing before the city court of Wichita on May 9, 1949—On January 16, 1950, placed on trial before a jury in the district court of Sedgwick County on a charge of receiving stolen property, having waived arraignment and pleaded not guilty. The state introduced evidence of seven witnesses—the seventh being Detective Reeves of the police department—concerning a police report and alleged changes in the report, which report was offered in evidence and, over defendant's objections, admitted and read to the jury. Defendant again objected to admission of said report and asked the court to declare a mistrial because of prejudice to defendant by its erroneous admission, but was overruled by the court. The state then rested its case and the court called for introduction of the case for the defense, whereupon counsel for the defense asked that the jury be excused while he argued some motions to the court. Before the jury was excused, counsel for the state explained for the record and to the jury the purpose for which the police report in controversy was offered in evidence. The jury having been excused, counsel for defendant moved for a directed verdict of not guilty and discharge of defendant for the reason the state had failed to prove the allegations and averments alleged in the second amended information, which motion was argued by counsel and taken under advisement by the court. Court was recessed, and on re-convening, argument on the motion to dismiss continued for some time, whereupon the court on its own motion ruled that "I am declaring a mistrial, and that ends the trial of this case . . . I . . . will require a new information totally . . . If the defense has any objections?"

Defense Counsel: "We will even assist them, if they want us to, in the description of the property."

On inquiry by counsel for the State as to grounds for the declaration of a mistrial, the court said "Oh, there is so much prejudicial error went to the jury with respect to Exhibit 12 (the police report) and there are some details of the defendant's complaint that are substantial."

On March 10, 1950, the state filed a third amended information to which defendant, petitioner herein, filed a motion to quash and a plea in bar on the premise that he cannot be twice put in jeopardy for the same offense. Said motions are pending, dependent upon the outcome of this habeas corpus proceeding.

The question to be determined here is whether defendant was placed in jeopardy in the proceeding before the district court resulting in declaration of a mistrial by the court so as to preclude trial in that court on the third amended information. The contention of the state is that defendant cannot now complain of the court's ruling (declaration of the mistrial) because of his own motion for a mistrial, eventually sustained and resulting in discharge of the jury, and also because defendant failed to object to such ruling and in fact stated "We will even assist them, if they want us to, in the description of the property"; that the relief sought (discharge in habeas corpus) is therefore not available when petitioner's cause is still pending in the lower court. Petitioner, on the other hand, argues that his motion for a mistrial was overruled and no longer before the court and no further motion for declaration of a mistrial in the case was interposed by him; that the defendant was placed in jeopardy when charged with commission of the crime, brought to trial, the jury empanelled and sworn to try the

cause, and trial begun before a court of competent jurisdiction upon an information sufficient to sustain a conviction.

G. S. 1935, 60-2914 provides:

> "The jury may be discharged by the Court on account of the sickness of a juror, or other accident or calamity, or other necessity to be found by the court requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing."

Petitioner contends that the court cannot arbitrarily discharge the jury before a verdict is returned and a discharge in such case, unless for an absolute necessity or for a reason provided by statute, will operate as an acquittal providing defendant has not waived his right to claim double jeopardy and has not joined the state in requesting a mistrial.

It is true that the discharge of a jury after the trial has begun without an overruling necessity or without the consent of the defendant will ordinarily operate as a bar to further prosecution (*State v. McKinney,* 76 Kan. 419, 91 Pac. 1068; *In re Rockwood,* 146 Kan. 386, 69 P. 2d 703, and cases cited therein.) However, the record in the instant case discloses that the defendant requested the court to order a mistrial. After Exhibit 12 had been offered and received in evidence, the defendant interposed an objection the pertinent part of which reads:

> " . . . We now ask the Court to declare a mistrial of this case on account of the error and prejudice that has been engendered in the minds of the jury by the reading of the report of this case by the detective and police officers, . . . for

the reason it is wholly incompetent . . . and it contains hearsay of the rankest sort . . . all of which is highly prejudicial and altogether incompetent, and we ask that you declare a mistrial at this time."

During the argument of defendant's motion for a directed verdict of not guilty, the court stated: "I am declaring a mistrial, and that ends the trial of this case." When questioned by counsel for the state as to the reason for the court's ruling, the court stated among other things: "Oh, there is so much prejudicial error went to the jury with respect to Exhibit 12 . . . "

It will be noted that the reason given by the court was the basis of the defendant's earlier request for a mistrial. It is well settled that if a jury is discharged at the instance of a defendant himself, he cannot set up the fact as a bar to a subsequent prosecution. (*State v. McKinney,* supra; *State v. Arnold,* 142 Kan. 589, 50 F. 2d 1008). Defendant argues that the court had previously overruled his request for a mistrial and no further request was made by him or the state and that his motion for a directed verdict of not guilty was pending before the court. His former objection to proceeding further in the case on account of the error and prejudice engendered in the minds of the jury by the reading of the police report was the very ground on which the court based his later declaration of a mistrial. The discharge of the jury was the necessary result of sustaining defendant's request and he has no right to complain that the court took the action which he had requested and to which no objection was made; his actions amounted to a consent.

The above rule was followed in the case of *State v. Arnold,* supra, in which the defendant was charged

under a forgery statute. Defendant was tried and at the close of the state's evidence moved for a directed verdict of not guilty because the state had failed to prove an offense charged or any offense. The court overruled that motion but sustained an earlier motion of the defendant on the ground of variance between the information and proof. Defendant was rearrested, tried under another forgery statute, and convicted. Before the second trial, the defendant filed a special plea in bar on the ground of former jeopardy. The court pointed out that an inconclusive result in the former trial had been reached (at the instance of the defendant) and said:

"It is finally contended that defendant's special plea in bar on the ground of former jeopardy should have been sustained. This plea is not available when an inconclusive result had been reached in a former criminal trial at the instigation of the defendant himself. *State v. McKinney,* 76 Kan. 419, 420, 91 Pac. 1068; *State v. Reynolds,* 140 Kan. 269, 36 P. 2d. 323, and citations; 16 C. J. 254, and note in 135 A. S. R. 70-73". (P. 594)

Defendant relies principally on the case of *State v. Stiff,* 117 Kan. 243, 234 Pac. 700, rehearing 118 Kan. 208. We do not believe this case is controlling under the facts in the instant case. In the Stiff case, Stiff filed a motion to quash the information before he had entered his plea of not guilty and before the jury had been sworn to try the case. At this point, jeopardy had not attached. His motion was overruled, the jury was sworn, and the state made a request to amend the information, which request was denied by the court, and the court thereupon sustained the motion to quash the information which previously had been overruled, as stated. This court held the jury was discharged

without the request or consent of defendant Stiff and he could not thereafter be tried. We distinguished the Stiff case in the case of *State v. Reynolds,* 140 Kan. 269, 36 P. 2d 323. Reynolds claimed he was in former jeopardy in a case where, after the jury was empanelled and sworn, he objected to the introduction of evidence for the reason the information failed to charge a public offense. The court sustained his objection and discharged defendant and jury. Defendant Reynolds claimed this was without his consent and relied upon the authority of *State v. Stiff,* supra. The court stated:

> "The facts on which this opinion (Stiff case) was based are very different indeed from those in the case at bar. In the latter we have the defendant objecting to the introduction of evidence after having been put in jeopardy, and his attorney pointing out the insufficiencies of the information, which go far towards making it invalid and such as might not sufficiently charge an offense as to sustain a judgment on a verdict of guilty. We also have the trial court sustaining the defendant's objection to the introduction of evidence, which of necessity disposes of the first case at the request and insistence of the defendant, instead of overuling the defendant's motion to quash, as in the Stiff case, and later reversing that ruling without any request from the defendant.
>
> . . . . . .
>
> "Appellant cites authorities to the effect that mere silence of the defendant, or his failure to object or protest against the discharge of the jury, does not constitute a consent to such discharge of the jury or in any way waive his constitutional rights against being subjected to a second jeopardy. To this we fully agree, but we can

readily see a distinction between such conduct and the active pressing of an objection the sustaining of which will produce the same result."

It is our conclusion that the petitioner by his request for the court to declare a mistrial waived his constitutional right of jeopardy if such existed after the jury was empanelled and sworn.

The state contends that habeas corpus did not lie in this case for the reason that the petitioner's cause is still pending and undetermined in the lower court. However, this court held many years ago that if the petitioner was entitled to his discharge in the district court, he ought to be released in his proceeding by habeas corpus, as that proceeding is the only one which affords him a speedy remedy. If his only remedy is by appeal, he must continue wrongfully restrained of his liberty until the case is finally determined by the district court, as an appeal can be taken by the defendant only after judgment. It would be a palpable violation of the bill of rights, and also of the statute, to require an accused who is entitled to his discharge, so far as relates to the offense for which he was committed, to be restrained of his liberty indefinitely at the instance of the state, or upon the order of the court, to await a final trial, or determination of the case against him. (*In re McMicken*, 39 Kan. 406, 409, 18 Pac. 473; *In re Lewis*, 152 Kan. 193, 102 P. 2d 981)

In view of what has been said, the writ will be denied.

SMITH, J. (dissenting): I dissent from all portions of the majority opinion except those holdings that habeas corpus is a proper remedy in the instant case. The sufficiency of the amended information upon which defendant was tried is not questioned.

A jury was duly empanelled and sworn to try the case, and after introduction of the state's evidence, defendant moved for a mistrial, which motion was by the court overruled. Thereafter the state rested its case. Defendant then interposed his motion for a directed verdict of not guilty and discharge. During argument on the latter motion, the court for reasons not provided by statute and on its own motion, without any request by either defendant or the state, declared a mistrial. Defendant's former motion for a mistrial had been overruled previously and was no longer before the court. Defendant did not object to the court's ruling. However, the state requested that the court make a record of its reasons for declaring a mistrial and no statutory reason was given by the court for its action.

When a defendant has been placed upon trial on a criminal charge, the jury is empanelled and sworn before a court of competent jurisdiction, and defendant is tried upon a sufficient information, the court cannot arbitrarily discharge the jury before a verdict is returned, and a discharge in such case, unless an absolute necessity or for a reason provided by statute, will operate as an acquittal providing, of course, that the defendant has not waived his right to claim double jeopardy and has not joined the state in requesting a mistrial. (*State v. Smith,* 44 Kan. 75, 24 Pac. 84; *State v. Reed,* 53 Kan. 767, 37 Pac. 174; *State v. Allen,* 59 Kan. 758, 54 Pac. 1062; *State v. Klauer,* 70 Kan. 384, 78 Pac. 802; *State v. Stiff,* 118 Kan. 208, 234 Pac. 700; *In re Rockwood,* 146 Kan. 386, 69 P. 2d 703). It is observed from the above decisions that the power to discharge a jury cannot be exercised arbitrarily by the court.

The majority opinion states that the remark made by defense counsel to the effect that "we will even

assist them, if they want us to, in the description of the property", constituted a waiver of jeopardy. In my opinion that statement was made in response to the court's statement just prior thereto requiring the state to file a new information, and cannot be considered as referring to an earlier statement by the court as to its action in declaring a mistrial.

The constitutional right of a party charged with a crime is that he is not to be twice put in jeopardy for the same offense, and the power of a court to discharge a jury which has been sworn to pass upon the question of his guilt or innocence must be exercised with the view of preserving inviolate his constitutional rights.

I am of the opinion that the writ should be granted.

PARKER and WERTZ, JJ., join in the foregoing dissenting opinion."

Thereafter the defendant filed his motion for rehearing which was likewise, by the Supreme Court of the State of Kansas, denied on August 3, 1950, and in its denial the Supreme Court handed down no written opinion.

The matter involved in this case is the right of a State Court to cause a defendant for the same offense to be twice put in jeopardy of life and limb in disregard of federal rights guaranteed unto him by virtue of the Fifth Amendment to the Constitution of the United States and State rights guaranteed unto him by virtue of Section 10 of the Bill of Rights of the Constitution of the State of Kansas.

THIS COURT HAS JURISDICTION.

By virtue of the federal rules of the United States Supreme Court, Rules 36, 38, 38½, 28 U. S. C. 2101 (c), which provide, in substance, that where a state court has decided a cause in a way probably not in accord with applicable decisions of the federal and state courts, pertaining to rights of liberty guaranted under the federal and state Constitutions, that this court has jurisdiction to review the state court decision through writ of certiorari.

QUESTION PRESENTED.

When a defendant has been placed upon trial on a criminal charge in a court of competent jurisdiction, upon an information which is sufficient to sustain a conviction, before a jury duly empanelled and sworn to try the cause and the state has introduced its evidence and rested and the defendant then moves for his discharge and a directed verdict and the court, in lieu of ruling thereon, declares a mistrial, discharges the jury upon purported trial errors and not at the request of the defendant nor as provided by law, and orders a new amended information filed, is it a bar to a further prosecution of the defendant for the same offense a second time under the rights and immunities afforded a defendant under the Fifth Amendment to the Constitution of the United States and the Bill of Rights of the State of Kansas?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. As a matter of law, the defendant was acquitted when the trial court declared a mistrial upon a ground not provided by law after jeopardy had attached.

2. The defendant is being deprived of his liberty in violation of the Fifth Amendment to the Constitution of the United States and the Bill of Rights of the State of Kansas, in that he is being subjected for the same offense to be twice put in jeopardy of life or limb.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of the State of Kansas commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court of the State of Kansas, had in the case numbered and docketed number 38044 in the matter of the petition of Lee Kamen for a writ of habeas corpus, petitioner, vs. Robert Gray, Sheriff of Sedgwick County, Kansas, respondent, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States and that the judgment herein of said Supreme Court of the State of Kansas be reversed by this Court, and for such further relief that to the Court seems proper.

DATED August 30th, 1950.

MARK H. ADAMS,
A. D. WEISKIRCH,
MANFORD HOLLY,
WILLIAM C. FARMER,
LEONARD LEVAND,
all of Wichita, Kansas,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1950

IN THE MATTER OF THE PETITION OF LEE KAMEN,
FOR A WRIT OF HABEAS CORPUS,
PETITIONER,

v.

ROBERT GRAY, SHERIFF OF SEDGWICK COUNTY, KANSAS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

To the Honorable Fred M. Vincent, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The majority opinion and dissenting opinion in the Supreme Court of the State of Kansas is reported in advance sheets of the Kansas Reports, Volume 169, Number 4, and is set forth verbatim heretofore in defendant's petition for writ of certiorari, supra, pages 20-29.

JURISDICTION.

1. The date of the judgment wherein the Supreme Court of the State of Kansas denied defendant's petition for writ of habeas corpus was filed July 8, 1950.

2. On August 3, 1950, the Supreme Court of the State of Kansas denied petitioner's motion for rehearing in the above matter.

3. The statutory provision which is believed to sustain the jurisdiction of this Court is 28 U. S. C. 2101 (c) which provides that where a state court has decided a cause in a way probably not in accord with applicable decisions of the federal and state courts, this Court has jurisdiction to review the state court decisions through writ of certiorari. Further, under said statute, this court has jurisdiction to review a state court decision where a defendant is deprived of his liberty without due process of law and is subjected for the same offense to be twice put in jeopardy of life or limb.

STATEMENT OF THE CASE.

A statement of the case has been made in the preceding petition on page 2, which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERROR.

The Supreme Court of the State of Kansas erred in denying petitioner's petition for a writ of habeas corpus in case numbered 38044 in the Supreme Court of the State of Kansas, in case styled Lee Kamen, petitioner, v. Robert Gray, Sheriff of Sedgwick County, Kansas, respondent, original proceedings in habeas corpus.

ARGUMENT.

SUMMARY:

Point One: As heretofore indicated by the pleadings in the habeas corpus proceeding in the Supreme Court and the record made of the trial of the defendant before the trial court, the defendant, during the progress of his felony trial, on the charge of receiving stolen property knowing it to have been so stolen, as charged in the second amended information hereinbefore set forth, moved the court, after the state rested, for a directed verdict and his discharge upon the ground that the state failed to prove the allegations in said second amended information and the trial court, in lieu of ruling thereon, discharged the jury without a necessity and without a reason provided by statute. Also the court at that time ordered a new and third amended information filed. In compliance therewith, the state filed a third amended information, setting forth the identical charge theretofore made in the second amended information and is now attempting to again prosecute the defendant for the same crime a second time. To the third amended information, there has been filed a plea in bar and a motion to quash, but rulings thereon are held in abeyance pending the outcome of this proceeding.

It is contended by the defense that the Court, in declaring a mistrial in the manner he did, acquitted the defendant of the charge preferred in the second amended information and therefore he cannot again be placed in jeopardy for the same offense and be tried upon the third amended information.

By reason of certain trial matters hereinafter appearing, the state is contending that the right to claim double jeopardy has been waived and since the majority of the Supreme Court of the State of Kansas upheld the state's contention that the defendant had waived his right to claim double jeopardy, the matter will be argued hereinafter in the converse, namely (1) the defendant did not, by his acts, waive his right to claim double jeopardy, and (2) as a matter of law he was acquitted by the trial court's declaration of a mistrial in the manner and at the juncture it was declared.

The pertinent statute of the State of Kansas is G. S. 1935, 60-2914, as follows:

> "The jury may be discharged by the Court on account of sickness of a juror, or other accident or calamity, or other necessity to be found by the Court requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing."

The record made by the trial court, at the time the jury was discharged and the court ordered the filing of a new and amended third information follows:

> "Oh, there is so much prejudicial error went to the jury with respect to Exhibit 12 and there are some details of the defendant's complaint that are substantial. In the first place it was prompted by the defense itself in asking the policeman to go down and get his report and then he was examined when he returned and these *is* remarks about the policeman's testimony and character. *Then* was the evidence of an altered instrument and it hints at perjured evidence and taking it all and all it is a

question of whether it is justice or not and, for that reason I am granting a mistrial and ordering a new information be filed and the case will be tried in the April Term. So get ready for the April Term of Court.

Bring down the jury.

(Jury brought into court at 10:35 A. M.)

THE COURT: Good morning, ladies and gentlemen of the jury. I have relieved you all of a big headache, I am granting a new trial in this case, I am declaring a mistrial because of errors which have come into the record before you and I don't want you passing on the merits of the case, so, I am not sending it to you as a jury, I am discharging you from further attendance on the trial of this case, but don't talk to anybody about this case because it is not finished as yet and don't allow anybody to pry out of you any information about this case. You may now return to your general jury room." (T. 69-70)

"THE COURT: Plenty of evidence went to the jury which was incompetent from both sides, on cross examination and on direct examination. And I will repeat, since the reporter is taking it down, mistakes were made on both sides, by the State's and by the defendant's attorney. In the first place the State's attorneys made a mistake in allowing this matter to drag on two years. You can't do that and the same rule applies to both sides. You cannot delay and then benefit by the delay. So, I have really come to the conclusion of what ought to be done in this case and I am about to state it. Here we have eminent citizens of this State on both sides. And, if a trial is to be had and if a conviction is to be had it ought to be right. I am declaring a mistrial and that ends the trial of this case. Now, then, but I am

also required and will require a new information totally, so that there will be no further mixing up on it. If the defense has any objection." (T. 68-69)

In answer to the court's query, and after the court had declared the mistrial, counsel for the defendant stated:

"We will even assist them if they want us to in the description of the property."

It was contended in the Supreme Court that the defendant waived his right to claim double jeopardy by having moved, during the progress of the trial and during the State's case in chief, that the court declared a mistrial upon the ground that hearsay evidence in the nature of a police report was erroneously offered and admitted in evidence, and the Supreme Court, in upholding said waiver, as indicated by the syllabus, justified said contention upon the premise that the court, on its own motion, reversed its former ruling wherein it denied defendant's motion to declare a mistrial and declared a mistrial on the ground set forth in the defendant's original motion for a declaration of mistrial.

In connection with the above, we specifically call to this court's attention the applicable portion of the sylabus in the Kansas Supreme Court's opinion which, to the writer, appears to contain a mis-statement of facts. The applicable portion of the syllabus is:

"Criminal Law—Mistrial—Former Jeopardy. Petitioner was charged with receiving stolen property. In the trial *is* the district court, after a jury had been empanelled and sworn and evidence of the state was introduced, the defendant moved the court to

declare a mistrial because of error and prejudice engendered in the minds of the jury by the admission of certain specified evidence, which motion was overruled. The state then rested its case, and defendant moved the court for a directed verdict of not guilty for the reason that the state had failed to prove the allegations in the information. *After some argument on the latter motion, the court on its own motion reversed its former ruling and declared a mistrial on the grounds set forth in defendant's original motion for declaration of a mistrial.* . . . " (Emphasis supplied.)

The mis-statement of fact is apparent in that the record does not disclose that the court on its own motion reversed its former ruling and declared a mistrial on the grounds set forth in defendant's original motion for declaration of a mistrial. The record does clearly set forth (T. 61) that the defendant objected to Exhibit 12, being the police officer's report, on the ground it was incompetent, irrelevant and immaterial and contained hearsay evidence and when the objection was interposed, *the court overruled defendant's motion to declrae a mistrial.* (T. 62) At no place does the record disclose that the court went back and reversed its ruling and it should be borne in mind that the state had rested before the court, on its own motion, declared a mistrial upon the grounds heretofore quoted. Further, the court, at the time of declaring the mistrial, which was after the state had rested, ordered the state to file a new and amended third information.

Our Supreme Court of Kansas had previously held that after jeopardy has attached it cannot be avoided

by the court going back to a motion which had been presented in the case in chief and had been denied and then the court sustaining the motion and discharging the jury. State v. Stiff, 117 Kan. 243, 234 P. 700; rehearing 118 Kan. 208.

In the Stiff case, supra, 118 Kan. 208, on rehearing, Stiff filed a motion to quash the information before he had entered his plea of not guilty and before the jury had been sworn to try the case. His motion was overruled. The jury was then duly empanelled and sworn to try the case and the State made a request to amend the information, which request was denied by the court. Later the court sustained the motion to quash the information which previously had been overruled and the Supreme Court of Kansas held the jury was discharged without the request or consent of the defendant Stiff and he could not thereafter be tried.

In the instant case, we have more or less a synonymous situation in that before trial the trial court overruled the defendant's motion to quash the second amended information upon which the defendant was tried. The jury was then empanelled and sworn to try the cause. The state introduced its evidence and during the introduction thereof defendant moved the court to declare a mistrial because of erroneously admitted evidence. The court overruled said motion. The state then rested its case and the defendant moved for a directed verdict and his discharge upon the grounds that the state had failed to prove its case. In lieu of ruling upon said motion for discharge, the court, *on its own motion and*

without reversing its former order denying a mistrial, granted a mistrial upon reasons that cannot be assigned as an absolute necessity nor upon any ground provided by statute. Simultaneously the court ordered the filing of a new amended third information, which brings the instant case directly in point with the Stiff case, supra.

It was further contended in the Supreme Court that the defendant, through his counsel, waived his right to claim double jeopardy when the court queried if there was any objection to the state filing a new and third amended information and counsel responded he would assist the state in the description of the property. In answer to the above, we call to the court's attention that the rule is well settled that no such statement by counsel could amount to a waiver of his client's constitutional right to claim double jeopardy in the absence of express authority on the part of the accused. The law seems to be that in the absence of express authority, an attorney has no power to surrender substantial legal rights of his client. 7 C. J. S., Attorney and Client, par. 100 C, page 922. Since there was no such assent given, the remark was ineffective as a waiver of the defendant's right to claim double jeopardy. To hold that the defendant acquiesced in the discharge of the jury through such a remark of counsel would be to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused. Lasser v. U. S., 315 U. S. 60, 72, 62 S. C. 457, 465, 86 L. Ed. 680. On the trial of a person charged with a felony, courts should not hold that constitutional

rights are waived unless the defendant directly waives them or requests or consents to some action that in itself amounts to a waiver. Courts should not hold that such rights are waived by silence. 16 C. J. 254, State v. Stiff, 118 Kan. 208.

It is conceded, for the sake of argument, that the right or immunity against being placed twice in jeopardy for the same offense is a personal right and individual privilege and it may be waived by the accused either expressly or impliedly. State v. Reynolds, 140 Kan. 269, 36 P. 2d 323; Brady v. U. S., 24 F. 2d 397, Cert. denied 278 U. S. 603, 49 S. C. 10, 73 L. Ed. 531. But, on the other hand, whether a waiver has occurred depends upon the circumstances of each case and without question a waiver involves the intentional relinquishment or abandonment of a known right or privilege. Further, a strong presumption is raised against the waiver of fundamental rights by an accused as his constitutional rights are jealously guarded. Johnson v. Zerbst, 304 U. S. 458, 464, 58 S. C. 1019, 82 L. Ed. 1461; Glasser v. U. S., 315 U. S. 60, 70, 62 S. C. 457, 86 L. Ed. 680; Von Moltke v. Gillies, 332 U. S. 708, 723, 68 S. C. 316, 92 L. Ed. 309; McCrea v. Jackson, 6 Cir. 148 F. 2d 193, 197; Himmelfarf v. U. S., 9th Cir., 175 F. 2d 924, 931.

In the instant case when the court declared a mistrial, the accused was silent, when the court ordered the state to file a new and amended third information, the defendant was silent, and after the court ordered the filing of the new information and asked counsel for the defendant if there was any objection and counsel

stated he would even assist the state in a correct description of the property, again the accused was silent and it seems to be definitely settled that mere silence of an accused or his failure to object or protest to a discharge of the jury cannot amount to a waiver of his right to claim double jeopardy. State v. Stiff, 118 Kan. 208, 209; 16 C. J. 254.

Certainly it would be a harsh rule to hold that a defendant consented to a withdrawal of a case from a jury simply because he interposed no objection, and there must be more than mere silence to overcome a presumption. 47 S. C. 166; 25 S. E. 220, 222, 35 L. R. A. 238.

It is the conclusion of the defendant that as a matter of law the defendant was acquitted when the trial court declared a mistrial upon a ground not provided by statute and without an absolute necessity after jeopardy had attached.

In support of the above contention, it has been held in Kansas that when a defendant has been placed upon trial on a criminal charge, a jury has been impanelled and sworn before a court of competent jurisdiction and the defendant has been tried upon a sufficient information, the Court cannot arbitrarily discharge the jury before a verdict is returned, and a discharge in such case, unless an absolute necessity or for a reason provided by statute, will operate as an acquittal providing the defendant has not waived his right to claim double jeopardy and has not joined the State in requesting a mistrial. State v. Smith, 44 Kan. 75, 24 P. 84; State v. Reed, 53 Kan. 767, 37 P. 174; State v. Allen, 59 Kan.

758, 54 P. 1060; State v. Klauer, 70 Kan. 384, 78 P. 802; State v. Stiff, 118 Kan. 208, 234 P. 700; in re Rockwood, 146 Kan. 386, 69 P. 2d 703.

In further support of the contention of law advanced in this case, we urge that the record made by the trial court at the time it declared a mistrial speaks for itself. The reasons that were assigned therein are numerous and it is apparent that a mistrial was not an absolute necessity, as trial errors could have been cured by an instruction to the jury to disregard erroneously admitted evidence and it is apparent that no statutory reason was assigned for declaring a mistrial. Further, the court's record claerly shows that the discharge of the jury before the completion of the trial was not only without the consent of the accused but was without sufficient statutory reason and same bars a further trial under the laws of the State of Kansas. State v. Reed, 53 Kan. 767, 37 P. 174.

It appears, from the trial court's reasoning, that it arbitrarily discharged the jury before a verdict because it was dissatisfied with the manner in which the trial was conducted and a discharge for such reason will operate as an acquittal under the authority of State v. Allen, 59 Kan. 758, 54 P. 1060. Too, it should be noted that our Supreme Court of Kansas has held, in the Allen case, supra, that the essential fact upon which the discharge is based and the finding of the court thereon must be entered of record and unless the record shows the existence of such fact and the decision of the court thereon and that they constitute sufficient

grounds for discharge, the defendant cannot again be put on trial for the same offense.

Regarding the above stated proposition of law, the trial court's record made at the time of declaring a mistrial does not show a statutory ground for declaring a mistrial, it does not show an absolute necessity for declaring a mistrial and certainly, under those conditions, the defendant cannot again be put on trial for the same offense.

Point Two: It is apparent, from the facts herein elucidated, that the defendant was placed upon trial on a felony charge in a court of competent jurisdiction. The second amended information was sufficient to sustain a conviction, as a matter of law, in this cause because the court had overruled the motion to quash it. He was tried before a jury duly empanelled and sworn to try the cause. The state introduced its evidence and rested and the defendant then moved for his discharge and a directed verdict, and the court, in lieu of ruling thereon, declared a mistrial and discharged the jury upon purported trial errors, without the request of the defendant, nor upon an absolute necessity, nor upon a ground provided by statute. The court then ordered a new and amended third information be filed. The latter information charges the defendant with the identical offense with which he was charged in the second amended information. It follows, that if, as a matter of law, the defendant was acquitted by the court's having unlawfully declared a mistrial, then it is a bar to a further prosecution of the defendant for the same offense a second

time under the rights and immunities afforded him under the Fifth Amendment to the Constitution of the United States and the Bill of Rights of the State of Kansas.

The Due Process of Law clause, Amendment Five to Amendments to the Constitution of the United States, provides, among other things, that no person shall be subject for the same offense to be twice put in jeopardy of life or limb and Section Ten of the Bill of Rights to the Constitution of Kansas provides, in substance, that no person shall be twice put in jeopardy for the same offense.

In conclusion, we respectfully submit that the action of the trial court, in declaring a mistrial, as indicated by the record, has acquitted the defendant, as a matter of law, upon the charge lodged against him in the second amended information upon which he was tried and he cannot again be tried upon the third amended information filed, which information charges the identical offense upon which he was previously tried, without depriving the defendant of the guarantees afforded him under and by virtue of his federal and state Constitutional rights. Also we submit that this case is one calling for the exercise of this Court of supervisory powers by issuing a writ of certiorari to the Supreme Court of the State of Kansas.

MARK H. ADAMS,
A. D. WEISKIRCH,
MANFORD HOLLY,
WILLIAM C. FARMER,
LEONARD LEVAND,
all of Wichita, Kansas,
Counsel for Petitioner.

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CLERK

SUPREME COURT of The UNITED STATES

OCTOBER TERM, 1949

No. 339

In the Matter of the Petition of
LEE KAMEN for a Writ of Habeas Corpus,
Petitioner,
vs.
ROBERT GRAY,
Sheriff of Sedgwick County, Kansas,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN F. EBERHARDT,
of Wichita, Kansas;
HAROLD R. FATZER,
Attorney General of the State of Kansas,
Topeka, Kansas;
C. HAROLD HUGHES,
Assistant Attorney General of the State of Kansas,
Topeka, Kansas;
JOHNIE FRANK,
County Attorney, Sedgwick County, Kansas,
Wichita, Kansas;
A. MARTIN MILLARD
Assistant County Attorney Sedgwick County, Kansas
Wichita, Kansas
EUGENE G. COOMBS,
Special Prosecutor,
of Wichita, Kansas;
Counsel for Respondent.

Angulo Printing Co., Wichita 2, Kansas

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vs.

ROBERT GRAY,
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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

Your respondent, Robert Gray, Sheriff of Sedgwick County, Kansas, in opposition to the petition for writ of certiorari and supporting brief, respectfully shows to this Honorable Court:

A.

OPINIONS BELOW

The opinion of the Kansas Supreme Court, rendered 8 July 1950, is reported in 169 Kan. 664, 220 P. (2d) 160, and appears at pages 20-29 of the Petitioner's Petition for Writ of Certiorari and Brief in Support thereof heretofore filed in this Honorable Court.

The opinion of the Kansas Supreme Court, rendered 3 August 1950, denying petitioner's application for a rehearing of the case, has not yet been officially or unofficially reported.

B.

JURISDICTION.

Petitioner seeks to invoke this Court's jurisdiction directly under Title 28, United States Code, Section 2101 (c) – and indirectly under the Fifth and Fourteenth Amendments to the United States Constitution and Sec. 10 (Bill of Rights) of the Kansas Constitution.

The decree of the Kansas Supreme Court was rendered on 8 July 1950. Timely petition for rehearing was denied on 3 August 1950. Petition for writ of certiorari was filed on 28 September 1950. A copy of petition and brief was served on counsel for respondent on 5 October 1950. To date no printed record or certified transcript of the record in this case has been served by the petitioner on counsel for the respondent, although more than ten days from the filing of the petition have elapsed. No references, therefore, to the page numbers of the printed record can be made. References to the record will be made, therefore, in this brief to the page numbers of the transcript made in the trial court.

Respondent maintains that the petitioner has not raised a federal question of substance not heretofore determined by this Court and that the decision of the Kansas Supreme Court of which petitioner complains was decided in accord with the applicable decisions of this Court – hence certiorari should be denied.

C.

STATEMENT OF THE CASE

This was an action by Lee Kamen for a writ of habeas corpus. Lee Kamen is the defendant in a criminal case now pending in the District Court of Sedgwick County, Kansas, for receiving stolen property, knowing it to have been stolen. The habeas corpus action was filed by the defendant Kamen as an original proceeding in the Kansas Supreme Court, on the grounds that by the trial court's action in discharging the jury during the progress of the trial, the defendant was immune from further prosecution on the grounds of double jeopardy. The Kansas Supreme Court in its decision held that the record disclosed that the defendant consented to the mistrial; that the defendant Kamen by his own motion had requested the Court to order a mistrial and the Court's action in doing so was the necessary result of sustaining the defendant's request. The Kansas Supreme Court concluded that the petitioner by his request for a mistrial, waived his constitutional right of jeopardy, if such existed. The basic facts essential to an understanding of the controversy are as follows:

Lee Kamen, the petitioner, on January 16, 1950, was placed on trial before a jury in the District Court of Sedgwick County, Kansas, in State of Kansas, Plaintiff, vs. Lee Kamen, Defendant, Case No. A29287, for receiving stolen property, knowing it to have been stolen. The petitioner had waived arraignment, pleaded not guilty, and the State introduced the testimony of seven witnesses. The defendant's counsel cross examined the State's seventh witness, Detective J. H. Reeves of the Wichita, Kansas, Police Department, concerning a police report and particularly as to certain alleged corrections or alterations contained therein. (State's Exhibit 12.) (T. 394-412.) After the defendant's

cross examination, the State offered the report in evidence, and it was admitted over the defendant's objection and read to the jury. (T. 392-394.)

The defendant then again objected to the police report (State's Exhibit 12), and asked the Court to declare a mistrial of the case by stating in open court:

> "MR. WEISKIRCH: Now, if your honor please, again we urge that that statement of J. H. Reeves, dated 4-17-48, 4:30 p. m., consisting of six sheets, styled 'The Coleman Company, Inc., 240 North St. Francis, dated 4-12-48, at the right C-81405, known as State's Exhibit 12, is wholly incompetent, irrelevant and immaterial which has been read to the jury with the permission of the court, by counsel for the State, we now ask the Court to declare a Mistrial of this case on account of the error and prejudice that has been engendered in the minds of the jury by the reading of the report of this case by the Detective and Police Officers, for the reason it is wholly incompetent and has no place in this proceeding and it contains hearsay of the rankest sort and stories that he got in different conversations without the presence of the accused, all of which is highly prejudicial and all together incompetent and we ask that you declare a mistrial at this time." (T. 412-413.)

The Court overruled the objection, and the defendant then moved for a directed verdict of not guilty, for the reason the State failed to prove the allegations and averments in the State's second amended information, on which the defendant was being tried. (T. 416.)

At the close of the argument, without any request whatsoever on the part of the State for a mistrial, the Trial

Court said in part, " . . . I am declaring a mistrial and that ends the trial of this case. Now, then, but I am also required and will require a new information totally, so that there will be no further mixing up on it. If the defense has any objection?" (T. 418-419.)

> "MR. WEISKIRCH: We will even assist them, if they want us to, in the description of the property." (T. 419.)
>
> "THE COURT: You bring it before the Court within a month after it is filed, anyway." (T. 419.)

Counsel for the State then inquired upon what grounds the mistrial was being declared, and the Court answered in substance that prejudicial error went to the jury due to the actions of both the plaintiff and defendant, and that there was a question of whether "it is justice or not," and for that reason he was granting a mistrial. (T. 419-420.)

The jury was then immediately discharged by the Court. No journal entry of the proceedings has been agreed upon, as it is the State's firm contention that the mistrial was granted at the defendant's counsel's request made during the argument of defendant's motion for a directed verdict during the absence of the reporter from the court room, as well as upon the defendant's previous motion for a mistrial, and the defense will not now concede to this. The Trial Court took a leave of absence due to failing health within a very few days after these occurrences transpired and traveled to South America and has not as yet returned to the bench. No journal entry can be filed, since the plaintiff and defendant are not in agreement, until the Trial Judge returns to his duties.

A new amended information was filed by the State in accordance with the Trial Court's instructions. The defend-

ant, instead of proceeding to trial on the new information in the next term of court, filed a petition for a writ of habeas corpus in the Kansas Supreme Court. The petition for a writ of habeas corpus was filed on the 21st day of February, 1950. The petition for a writ of habeas corpus, after oral argument, was denied on 8 July 1950. A motion for rehearing was denied by the Kansas Supreme Court on 3 August 1950, all on the grounds that the defendant had requested and consented to the Court's ordering a mistrial.

It is this decision which the petitioner asks this Court to review upon certiorari.

D.

SUMMARY OF ARGUMENT

I. The mistrial was ordered by the Trial Court upon petitioner's consent, instigation and request, which constituted a waiver by the accused of his constitutional rights, if any existed. Under the present facts, double jeopardy does not exist under the Kansas laws, or when measured by the Federal rule, and violates neither the Fifth nor the Fourteenth Amendment to the United States Constitution or the Bill of Rights of the State of Kansas.

II. The right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment to the United States Constitution is not generally regarded as coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct State process.

III. The question of authority and power of petitioner's attorney to consent to and request the Court to order a

mistrial was not raised before and, therefore, is not a proper subject of review in a petition for certiorari.

E.

ARGUMENT AND AUTHORITIES

I. FORMER JEOPARDY IS NOT A DEFENSE WHERE THE JURY WAS DISCHARGED ON THE DEFENDANT'S MOTION OR WITH HIS CONSENT.

The Supreme Court of the State of Kansas found that the trial court's action in ordering a mistrial and discharging the jury " . . . was the necessary result of sustaining defendant's request and he has no right to complain that the court took the action which he had requested and to which no objection was made; his actions amounted to a consent." *In the Matter of the Petition of Lee Kamen for a Writ of Habeas Corpus* v. *Robert Gray, Sheriff of Sedgwick County, Kansas,* 169 Kan. 664, 667; 220 P. (2d) 160.

The Kansas Supreme Court, in denying petitioner's application for a writ of habeas corpus, followed the rule of that court previously expressed in *State* v. *Arnold,* 142 Kan. 589, 50 P. (2d) 1008; *State* v. *McKinney,* 76 Kan. 419, 91 P. 1068; and *State* v. *Reynolds,* 140 Kan. 269, 36 P. (2d) 323.

It is submitted that ample facts were present justifying the Kansas Supreme Court's conclusion, including petitioner's motion for a mistrial, where it was stated, " . . . We now ask the court to declare a mistrial of this case on account of the error and prejudice that has been engendered in the minds of the jury . . . and we ask that you declare a mistrial at this time." (T. 412-413.)

At the time the trial court ordered a mistrial and before discharging the jury, the Court queried, " . . . If the de-

fense has any objection?" (T. 419.)

As can be seen from the transcript taken in the trial court, the attorney for the petitioner replied, "We will even assist them, if they want us to, in the description of the property." (T. 419.)

The Kansas Supreme Court, in denying petitioner's application for a writ of habeas corpus on the grounds of double jeopardy, acted under the authority of previous decisions of that State and in accordance with the authority of the decision in *Barrett* v. *Bigger*, 17 F. (2d) 669, 670, (App. D. C.), certiorari denied, 274 U. S. 752, 71 L. ed. 1333, 47 S. Ct. 765, in which case the Court said:

> "A defendant cannot plead former jeopardy, where the jury by which he was first on trial was discharged on his own motion or with his consent." (p. 670.)

It should be noted in the case last cited that certiorari was denied under facts and circumstances strikingly similar to those present in the case at bar. Among the numerous additional authorities holding that former jeopardy is not a defense where the jury was discharged on the defendant's motion or with his consent, are: *Thompson* v. *U. S.*, 155 U. S. 271, 39 L. ed. 146, 15 S. Ct. 73; *U. S.* v. *Watson*, 28 Fed. Cas. No. 16,651. The United States Supreme Court will not generally review such cases: *Williams* v. *Kaiser*, 323 U. S. 471, 89 L. ed. 398, 65 S. Ct. 363.

Petitioner in his brief has cited the statute of the State of Kansas, G. S. 1935, 60-2914, which reads as follows:

> "The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity or other necessity to be found by the court requiring their discharge, or by consent of both parties, or after

> they have been kept together until it satisfactorily appears that there is no probability of their agreeing."

We submit that this statute is not important to the consideration of this case, inasmuch as the petitioner requested and consented to the ordering of the mistrial by the Trial Court. (T. 412-413, 419.) The only protest to the ordering of the mistrial was on the part of the State. (T. 419.)

The Kansas statute enumerates sundry reasons for which a Trial Court may discharge the jury, but in construing the statute, the Kansas Supreme Court has expressly pronounced that the discharge of a jury in a criminal case with the defendant's consent or upon the motion made by the defendant is not a bar to subsequent prosecution for the same offense: *State v. McKinney, supra; State v. Reynolds, supra;* and *State v. Arnold, supra.*

The petitioner in his brief, in commenting on the syllabus written by the Kansas Supreme Court, asserts a misstatement of fact was made in the syllabus, contending the record does not disclose that the court on its own motion reversed its former ruling and declared a mistrial on the grounds set forth in defendant's original motion for declaration of a mistrial. It is submitted that this constitutes a play on words, and that the attorney for the petitioner, in making his argument before the Kansas Supreme Court, insisted that the Trial Court on its own motion without the defendant's consent declared a mistrial, which theory was rejected by the Kansas Supreme Court on the basis of the testimony and statements made during the trial of the case in the lower court. The Kansas Supreme Court, in rejecting petitioner's theory, pointed out that the defendant had requested on his own motion and consented to the Court's ordering a mistrial and discharging the jury.

The petitioner's brief relies on the case of *State* v. *Stiff*, 117 Kan. 243, 234 P. 700, affirmed on rehearing 118 Kan. 208, 234 P. 700, for the proposition that once jeopardy has attached it cannot be voided by the Court's sustaining a motion which had previously been presented and denied.

The facts in the case of *State* v. *Stiff, supra,* reflect that the motion originally made, which was overruled, was to quash the information on the grounds that it did not state facts sufficient to constitute a public offense. At the time this motion was made, the jury had not been impaneled and sworn to try the cause. After the jury had been sworn and while the prosecuting attorney was making the opening statement to the jury, it was discovered by the prosecution that the information was defective. The prosecution asked leave to amend the information, which request was denied. The Court entered an order quashing the information. The prosecution then filed a subsequent information, charging the defendant with the same offense, and upon trial a verdict of guilty was returned and judgment was pronounced thereon. In view of these circumstances and in absence of the consent of the accused to the discharging of the jury, the Court held that the defendant had been placed twice in jeopardy and was dicharged. It is submitted that this case is not in point, and the facts and ruling of the court in the case of *State* v. *Stiff* were considered below by the Kansas Supreme Court and dismissed as not controlling, by the following statement:

> "Defendant relies principally on the case *State* v. *Stiff*, 117 Kan. 243, 234 P. 700, rehearing 118 Kan. 208. We do not believe this case is controlling under the facts in the instant case."

The Court further pointed out that in the case *State* v. *Stiff*, jeopardy had not attached at the time the motion to

quash the information was made.

The Kansas case of *State* v. *Arnold,* 142 Kan. 589, 50 P. (2d) 1008, cited by the Kansas Supreme Court for the proposition that where the jury was discharged at the instance and with the consent of the defendant, he cannot set up that fact as a bar to subsequent prosecution, was decided and reported ten years after the decision in *State* v. *Stiff* was rendered.

The case of *State* v. *Stiff* was cited and strongly urged in the case of *State* v. *Reynolds,* 140 Kan. 269, 36 P. (2d) 323, which was decided nine years after the *State* v. *Stiff* case. Nevertheless the Kansas Supreme Court in *State* v. *Reynolds,* upon facts fully analogous to those of the case at bar, followed the established Kansas law by holding in effect that when the jury, at the instance of the defendant, has been discharged, the defendant cannot thereafter plead former jeopardy when placed on trial on another information for the same offense, having waived by his former action his constitutional privilege.

II. "DOUBLE JEOPARDY" UNDER THE FIFTH AMENDMENT, OR AS CONSTRUED WITH THE PROVISIONS OF THE FOURTEENTH AMENDMENT, IS NOT CONSIDERED A PROPER SUBJECT OF REVIEW WITHIN THE FEDERAL POWER OF THIS COURT TO CORRECT STATE PROCESS.

The constitutional questions asserted by petitioner have been raised indirectly and primarily by implication. Only constitutional issues raised in the lower courts are considered by this court on appeal or by certiorari: *Hulbert* v. *City of Chicago,* 202 U. S. 275, 50 L. ed. 1026, 26 S. Ct. 617. Petitioner contends in his argument that the defendant's rights and immunities afforded him under the Fifth Amendment to the Constitution of the United States (and the Bill

of Rights of the State of Kansas) are being violated. It has been repeatedly held that the Fifth Amendment to the Constitution "does not operate as a 'restriction of the powers of the State, but was intended to operate solely upon the Federal Government'." *Barrington* v. *Missouri,* 205 U. S. 483, 51 L. ed. 890, 27 S. Ct. 582, citing *Brown* v. *N. J.,* 175 U. S. 172, 44 L. ed. 119, 20 S. Ct. 77.

In *McNabb* v. *U. S.,* 318 U. S. 332, 340, 87 L. ed. 819, 63 S. Ct. 608, rehearing denied, 319 U. S. 784, 87 L. ed. 1727, 63 S. Ct. 1322, it was held that the power of the United States Supreme Court to undo convictions in State courts "is limited to the enforcement of those 'fundamental principles of liberty and justice' which are secured by the Fourteenth Amendment . . . " *Hebert* v. *Louisiana,* 272 U. S. 312, 316, 71 L. ed. 270, 47 S. Ct. 103, 48 A. L. R. 1102.

Double jeopardy under the Fifth Amendment to the Constitution has been construed in *Commonwealth ex rel Garland v. Ashe,* 344 Pa. 407, 26 Atl. (2d) 190, to apply as a restriction only on the power of the Federal Government and not on the State Government: *Hurtado* v. *California,* 110 U. S. 516, 534, 28 L. ed. 232, 4 S. Ct. 111, 4 S. Ct. 292; *State of Kansas* ex rel *William A. Smith* v. *The City of Kansas City, et al.,* 125 Kan. 88, 90, 262 P. 1032; *Frank J. Sester* v. *The Belvue Drainage District,* 162 Kan. 1, 6, 173 P. (2d) 619.

In the case of *Bennington* v. *Warden of Maryland House of Correction,* ____ Md. ____, 59 Atl. (2d) 779, it was held:

> "The rule against double jeopardy contained in the Fifth Amendment to the United States Constitution applies only to trials in the Federal courts and is not implicit in the Fourteenth Amendment."

Cited in the case is *Palko v. State of Connecticut*, 302 U. S. 319, 82, L. ed. 288, 58 S. Ct. 149.

Under the decisions above cited, and numerous others, it is apparent that the provisions of the Fifth Amendment relating to double jeopardy should not be construed as a restriction upon the State courts unless, perhaps, in extreme instances shocking to this Court and to mankind. No such circumstances are present in this case, and no precedent has been found under the Fifth Amendment which would authorize or make it advisable for the Supreme Court of the United States to review the decision of the Kansas Supreme Court upon the authority of the Fifth Amendment.

Inasmuch as petitioner, in his petition and brief to this Court, premises his claimed deprivation of rights, privileges and immunities exclusively upon the Fifth Amendment, and inasmuch as that amendment, as hereinbefore demonstrated, has no application to state courts, it follows ineluctably that petitioner has failed to adduce any ground for certiorari within the jurisdictional requirements of this Court. Accordingly, the petition must be denied.

As for the Fourteenth Amendment, petitioner, albeit setting forth the amendment in his petition for habeas corpus (Pet. for Cert., p. 12), failed to present any argument based thereon to the Kansas Supreme Court. Nor does the Kansas Supreme Court opinion deal with or discuss the Fourteenth Amendment. Moreover, and in any event, freedom from "double jeopardy" – the sole deprivation upon which petitioner seeks certiorari – is not guaranteed by the *Fourteenth Amendment*. Thus, in *Amrine* v. *Tines*, 131 F. (2d) 827 (C. C. A. 10), defendant Tines was charged with forgery of a bank check in the District Court of Sedgwick

County, Kansas, the same forum in which the case at bar arose. A jury was duly impaneled and the State completed its case and rested; whereupon the Court, upon its own motion but without objection from either party, dismissed the action without prejudice. A short time later the defendant was again charged for the same offense in the same jurisdiction and pleaded double jeopardy, in violation of his constitutional rights granted by the Fifth and Fourteenth Amendments. With reference to said contention, the Court held:

> "The contention of the appellee, upheld by the trial court, that he was twice placed in jeopardy for the same offense in violation of his constitutional rights, . . . must rest upon the dominant command of the Fourteenth Amendment. And . . . the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due processes and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct State process."

The Court commented further that if the right sought to be vindicated, that is, double jeopardy, does not come within the dominant command of the Fourteenth Amendment, jurisdiction to inquire concerning the cause of restraint does not exist in the Federal Court, and in arriving at this conclusion the Federal courts have received assistance by applying the Federal rule in cases brought up from the State court in determining that double jeopardy did not actually exist.

Attention is directed to the fact that the case of *Amrine v. Tines, supra,* arose in the same jurisdiction and same court as the case at bar, and although the facts in the

Amrine case came closer to justifying the claim of double jeopardy made by the petitioner than the facts in the case at bar, the Federal Court in the *Amrine* case declined to interfere with, alter or correct the processes of the State court.

This court, in construing the due process of law clause of the Fourteenth Amendment has stated that this clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable the United States Supreme Court to review the decisions of the State courts upon questions of State law: *Enterprise Irrigation District* v. *Farmers Mutual Canal Company*, 243 U. S. 157, 61 L. ed. 644, 37 S. Ct. 318.

It is therefore submitted that jurisdiction is lacking to grant certiorari in the case at bar.

III. PETITIONER BY HIS ATTORNEY CONSENTED TO AND MOVED THE COURT TO ORDER A MISTRIAL.

Petitioner now contends, for the first time, that his attorney had no power or authority to ask for or consent to a mistrial when the case was being tried in the lower court. Petitioner was represented in the lower court by able counsel (in fact no less than three of them) who were present at all stages of the proceedings and spoke for the petitioner on his behalf when called upon to do so and when they deemed it advisable.

Petitioner, in support of his argument to the effect that the defendant should not be considered as acquiescing in his attorney's request for the ordering of a mistrial and consent to the ordering of a mistrial, cites the case of *Glasser* v. *U. S.*, 315 U. S. 60, 72, 86, L. ed., 680, 62 S. Ct.

457, 465, which case it is submitted is not in point. The only portion of the case which could possibly have any bearing on the point for which it is cited is that part of the opinion granting the defendant his rights to be represented by an attorney under the Sixth Amendment. It has never been contended petitioner was denied this constitutional right.

Petitioner maintains that under *State* v. *Stiff, supra,* 118 Kan. 208, 234 P. 700, and under the authority of 16 C. J. 254, inasmuch as the *defendant* remained silent in the courtroom – although his *attorney* moved the court for a mistrial and consented to the court's granting a mistrial and discharging the jury – the defendant's rights were not waived by his silence. We believe this position is untenable and are unable to find anything in the case of *State* v. *Stiff, supra,* as authority for this statement.

The cases cited by petitioner on page 42 of his brief, to the effect that a strong presumption is raised against the waiver of fundamental rights by an accused, are not remotely in point here. In any event, this issue was never presented to or decided by the Kansas Supreme Court and manifestly affords no proper basis for certiorari.

On pages 43 and 44 of the petitioner's brief, various cases are cited in support of the petitioner's contention that the defendant was acquitted as a matter of law when the Trial Court declared a mistrial upon a ground not provided by statute and without an absolute necessity therefor. We believe this statement to be an incorrect statement of the law in Kansas, contrary to the holdings of the Kansas Supreme Court in the cases of *State* v. *McKinney,* 76 Kan. 419, 91 P. 1068; *State* v. *Reynolds,* 140 Kan. 269, 36 P. (2d) 323; and *State* v. *Arnold,* 142 Kan. 589, 50 P. (2d)

1008, and we submit that the following cases cited by petitioner in support of his erroneous statement of the law are inapplicable and not in point for the following reasons:

State v. Smith, 44 Kan. 75, 24 P. 84,
because the defendant was not present and the jury was discharged because of one of the juror's illness;
State v. Reed, 53 Kan. 767, 37 P. 174,
because the court held that when the jury was discharged by reason of the sickness of one of its members, it did not constitute double jeopardy;
State v. Allen, 59 Kan. 758, 54 P. 1060,
because the defendant did not consent to or request a mistrial or that the jury be discharged;
State v. Klauer, 70 Kan. 384, 78 P. 802,
because the jury was discharged, as they could not agree;
In Re Rockwood, 146 Kan. 386, 69 P. (2d) 703,
because the jury was dismissed by the court during the proceedings, whereupon the court proceeded to try the case without the jury and found the defendant guilty.

The record fully reflects that the accused was at all times and at all stages of the proceedings represented by competent counsel, and that they were vigilant and active in the defense of his rights and in the making of a record for the protection of his rights. The ordering of a mistrial and the resulting discharge of the jury was at the request, instigation and with the consent, of the accused through his attorney, and it is well established that when a party invites a particular ruling, he is precluded from assailing such ruling on review: *Mercer, et al.* v. *McPherson, et al.,* 70 Kan. 617, 79 P. 118.

IV. DOUBLE JEOPARDY UNDER THE KANSAS BILL

OF RIGHTS IS A STATE QUESTION AND NOT FOR FEDERAL REVIEW.

The petitioner also complains to this Court that he has been deprived of his rights and the protection to which he is entitled under Section 10 of the Bill of Rights of the Constitution of Kansas, which in part reads:

> " . . . No person shall be a witness against himself, or be twice put in jeopardy for the same offense."

The determination of this question is one solely and exclusively to be decided by the Supreme Court of Kansas, and the decision of that court is and should be final on that particular question: *Jack* v. *Kansas,* 199 U. S. 372, 50 L. ed. 234, 26 S. Ct. 73.

F.

CONCLUSION

Petitioner seeks certiorari to the Kansas Supreme Court upon the sole ground that its decision erroneously subjects him to double jeopardy in violation of the Fifth Amendment to the Constitution of the United States. Since that amendment has no application to State courts, it follows that jurisdiction is lacking to grant petitioner the relief prayed for. (28 U. S. C. §1257(3))

Moreover, review by certiorari is not a matter of right but of sound judicial discretion, granted only when there are special and important reasons therefor and where a State court has decided a Federal question of substance not theretofore determined by this Court or in a way probably not in accord with this Court's applicable decisions (Rule 38(5)). The precise questions presented by petitioner have been decided numerous times previously, not only by this Court but also by inferior courts of nearly every

jurisdiction, and it is submitted there are no special or important reasons for allowing certiorari in the case at bar.

Respectfully submitted,

JOHN F. EBERHARDT,
of Wichita, Kansas;

HAROLD R. FATZER,
Attorney General of the State of Kansas,
Topeka, Kansas;

C. HAROLD HUGHES,
Assistant Attorney General of the State of Kansas,
Topeka, Kansas;

JOHNIE FRANK,
County Attorney, Sedgwick County, Kansas,
of Wichita, Kansas;

A. MARTIN MILLARD
Assistant County Attorney Sedgwick County, Kansas
Wichita, Kansas

EUGENE G. COOMBS,
Special Prosecutor,
of Wichita, Kansas,
Counsel for Respondent.

No. 339.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

IN THE MATTER OF THE PETITION OF LEE KAMEN,
FOR A WRIT OF HABEAS CORPUS,
PETITIONER,

vs.

ROBERT GRAY, SHERIFF OF SEDGWICK COUNTY, KANSAS,
RESPONDENT.

REPLY OF PETITIONER TO BRIEF OF RESPONDENT, ROBERT S. GRAY.

MARK H. ADAMS,
A. D. WEISKIRCH,
MANFORD HOLLY,
WILLIAM C. FARMER
LEONARD LEVAND,
of Wichita, Kansas,
Attorneys for Petitioner.

KANSAS LAW PUB. CO., TOPEKA

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REPLY OF PETITIONER TO BRIEF OF RESPONDENT, ROBERT S. GRAY.

MAY IT PLEASE THE COURT:

Your petitioner, Lee Kamen, for his reply to the brief of respondent herein, respectfully shows this Honorable Court:

A. SUPPLEMENTAL STATEMENT.

In the Court below, one of the grounds relied upon and set out in the petition for Writ of Habeas Corpus is that petitioner's imprisonment is unlawful and that he

is being deprived of his liberty in violation of the Fourteenth Amendment to the Constitution of the United States (Abstract 2).

The Supreme Court of the State of Kansas recognized the claim of petitioner to the effect that he is being deprived of his liberty in violation of the Federal Constitution, but notwithstanding said claim, the petition for the writ was denied on the ground that said petitioner had waived his Constitutional right of jeopardy. (Kamen v. Gray, 169 Kan. 664, 665, 669, 220 P. 2d 160).

B. ADDITIONAL JURISDICTIONAL STATEMENT.

The Kansas Court has decided a Federal question relating to jeopardy in violation of rights under the Fourteenth Amendment not heretofore determined by the Supreme Court of the United States and therefore review on Writ of Certiorari should be granted.

C. ADDITION TO QUESTION HERETOFORE PRESENTED.

Where a defendant has been placed upon trial before a jury, upon an information sufficient to sustain a criminal conviction, and the State introduces its evidence and rests, and thereupon a motion by said defendant for a directed verdict and discharge is argued and the trial Court, in lieu of ruling upon said motion, declares a mistrial and discharges the jury on the ground that incompetent evidence has been introduced by the State, is a further and second prosecution, based upon a new information, for the same offense, barred under the due

process clause of the Fourteenth Amendment to the Constitution of the United States?

D. ADDITIONAL REASON RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner is being denied the benefit of his plea of former jeopardy contrary to the United States Constitution, Fourteenth Amendment.

E. ARGUMENT AND AUTHORITIES.

Preliminarily we desire to state that petitioner is fully cognizant of the fact that a review on Writ of Certiorari is not a matter of right but of sound judicial discretion and is granted only where there are special and important reasons therefor.

We do not wish to repeat what has been argued heretofore, however, by reason of the divided opinion of the Kansas Court and of the authorities and argument heretofore presented, and which we herein present, we submit that there is good reason for an order granting certiorari in this case.

Notwithstanding the decisions of Federal Circuit Courts, Federal District Courts and the Courts of the various states on the questions presented, the decisions of this Court only (Supreme Court of the United States) are determinative of our right of review, as we understand the law.

I. JURISDICTION BY REASON OF CLAIM OF IMMUNITY OF ARTICLE V OF AMENDMENTS TO THE FEDERAL CONSTITUTION.

On the question of the applicability of Article V of Amendments to the Federal Constitution, and immunity from a second trial claimed thereunder, attention is called to the case of Bohanan v. Nebraska, 118 U. S. 231, 30 L. ed. 71. It is to be noted that in that case the Court held that where immunity from a second trial is specially set up under Article V of Amendments, the Supreme Court of the United States has jurisdiction to review that decision.

In Bohanan v. Nebraska the plaintiff, in error, was indicted in a State Court of Nebraska, charged with murder in the first degree. Upon trial, he was convicted of murder in the second degree. The Supreme Court of Nebraska awarded him a new trial. When his case was remanded to the lower Court, he was again placed on trial on the same indictment. To this indictment plaintiff, in error, filed a plea of autrefois acquit, as to the charge of murder in the first degree, setting forth the facts of his previous conviction, on said indictment, of murder in the second degree. This plea was adjudged bad by the trial Court, for the reason that the former judgment had been set aside at the instance of the plaintiff in error. The question was again presented to the trial Court, by way of a request for an instruction to the jury to the effect that, by reason of the previous acquittal, they could not convict the accused of murder in the first degree, which instruction was refused; where-

upon the jury convicted this plaintiff in error o f murder in the first degree and the Court sentenced h im to be hanged. This cause was again taken to the Supreme Court of Nebraska, and these rulings, with othe r matters, assigned as errors, but the judgment of the lo wer Court was by the Supreme Court affirmed; whereup on a writ of error was sued out.

One of the assignments of error in the petitio n in error before the Supreme Court of the State of Neb raska was as follows:

> "The said court erred in putting the sa id defendant twice in jeopardy for the same offens e in violation of and in disregard of Article V of the Amend ments to the Constitution of the United St ates, which provides: 'Nor shall any person be subj ect for the same offense to be twice put in jeopar dy of life and limb'."

In deciding the above case, it was held tha t immunity from a second trial for the same offense by reason of the Article V of the Amendments to the Constitu tion of the United States having been set up and the sa me having been denied defendant by the judgment of th e Supreme Court of the State, the Supreme Court of the United States had jurisdiction to review that decisi on, the syllabus in connection therewith being as follow s:

> "The Supreme Court of a State havi ng denied a claim of immunity specially set up unde r Article V of the Amendments to the Federal Const itution, this Court has jurisdiction to review that de cision."

We find no other decisions of this Court on the question and by reason of the holding of the Court in that case, we submit that jurisdiction herein is not lacking.

II. JURISDICTION BY REASON OF HAVING BEEN PLACED IN JEOPARDY FOR THE SAME OFFENSE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

On the question of a right of review based upon petitioner's having been twice placed in jeopardy for the same offense in violation of the Constitutional right afforded by the Fourteenth Amendment to the Constitution of the United States, attention is directed to the case of Keerl v. Montana, 213 U. S. 135, 53 L. ed. 734. There the Court held:

> "A specific contention on the trial of a criminal cause in a state court, that the denial to the accused of the benefit of his plea of former jeopardy operates to deprive him of his liberty without due process of law, contrary to U. S. Const. 14th Amend., raises a Federal question which will sustain a writ of error from the Federal Supreme Court to review the judgment of the highest court of the state, affirming the conviction below."

It is to be noted that in Keerl v. Montana, supra, the Court held that jeopardy had not attached and did not, as a result, decide the question of whether the Fourteenth Amendment in itself forbids a State from putting one of its citizens in second jeopardy. From our search, we fail to find a case in which this Court has directly passed upon the question.

Respondent cites the case of Amrine v. Tines, 131 F. 2d 827, (C. C. A. 10). This case is directly contra to

the holding in Ex parte Ulrich, 42 F. 587, where the Court there held:

> "Since it is a principle of the common law that no one shall be twice placed in jeopardy for the same offense, the trial and commitment of one who has already been tried and acquitted of the same offense is depriving him of his liberty 'without due process of law', within the meaning of Const. U. S. Amend. 14."

Since the question does not appear to have been decided and further since petitioner has contended and now contends that the denial to him of his plea of former jeopardy operates to deprive him of his liberty without due process of law contrary to the United States Constitution, Fourteenth Amendment, we submit that this Court has jurisdiction and that a Federal question is presented which gives right to review on Writ of Certiorari.

III. THE QUESTION OF WAIVER OF CONSTITUTIONAL RIGHT OF JEOPARDY.

Notwithstanding our argument heretofore presented on the question of waiver, we desire to briefly comment further.

The Kansas Court, in deciding the case from which this petition for Writ of Certiorari is sought, stated and held that petitioner had waived his Constitutional right of jeopardy. In this connection, the Court said: "It is our conclusion that the petitioner, by his request for the Court to declare a mistrial, waived his Constitutional right of jeopardy, if such existed, after the jury

was empanelled and sworn." (Kamen v. Gray, 169 Kan. 664, 66, 220 P. 2d 160.)

If it can be said that the Constitutional protection invoked by petitioner was denied by the Kansas Court on non-federal grounds, we submit that it still is within the province of the Supreme Court of the United States to inquire whether the decision of the state Court rests upon a fair or substantial basis.

In point is the case of Broad R. P. Co. v. South Carolina, ex rel. Daniel, 281 U. S. 537, 71 L. ed. 1023. There is was held:

> "Even though the constitutional protection invoked by a party to a suit in a state court be denied by the state court on non-Federal grounds, it is the province of the Supreme Court of the United States to inquire whether the decision of the state court rests upon a fair or substantial basis."

The cases of State v. Stiff, 118 Kan. 208, 234 P. 700; State v. Reynolds, 140 Kan. 269, 36 P. 2d 323; and State v. Arnold, 142 Kan. 589, 50 P. 2d 1008, have heretofore been cited both by petitioner and by respondent. We believe that it will be of help if the factual situations in each of these cases are briefly summarized.

In the case of State v. Stiff, supra, a motion to quash was lodged against the information, which motion was overruled. Thereafter a jury was empanelled and sworn to try the case. The state then asked leave to amend the information and this was denied, however the Court, on reconsideration, then went back and sustained the motion to quash originally filed and discharged the jury.

On a second trial for the same offense, it was held that jeopardy had attached in the first instance.

In the case of State v. Reynolds, supra, after a jury had been empanelled and sworn to try the case, the defendant objected to the introduction of any evidence for the reason that the information in that case failed to state an offense. After due consideration, the Court sustained this objection and the defendant was discharged. On a plea of former jeopardy, it was held that because of the sufficiency of the information and the objection by defendant of the introduction of any testimony thereon that jeopardy had not attached.

In State v. Arnold, supra, a jury was empanelled and sworn and evidence was introduced. After the State had rested, defendant moved for an instructed verdict of not guilty, which motion was sustained and the jury was discharged. Defendant was later charged and convicted on the same evidence under another statute. On the second charge, he pleaded former jeopardy, which the Court held was not available.

We fail to see where the decisions in the case of State v. Reynolds, supra, or the case of State v. Arnold, are in anywise controlling. In the instant case, it is true that a request was made by defendant of the Court to declare a mistrial. This motion, however, was overruled. After the State's evidence was concluded, defendant moved for a directed verdict and discharge. The Court did not pass on this motion, but on the contrary, discharged the jury on the sole ground that evidence had gone to the jury which was incompetent. (A. 23)

It is settled law that error in the admission of evidence which can be cured by instructing the jury to disregard it does not necessitate the discharge of the jury in a criminal prosecution. It was so held in Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708; 7 S. Ct. 614; Oliveros v. State, 120 Ga. 237, 47 S. E. 627.

We submit that after the State had rested its case and petitioner had moved for a directed verdict and discharge, he was entitled, as a matter of right under the law of the State of Kansas and the Constitutional provisions referred to herein, to a ruling of the trial Court on that motion. A denial of that right, petitioner having been placed on trial a second time for the same offense, causes him to be deprived of his liberty and of rights afforded by the Constitution of the United States and for that reason he is entitled to a discharge.

F. CONCLUSION.

By reason of all of the foregoing and of the authorities cited and the matters set out in the petition for Writ of Certiorari filed herein, review on Writ of Certiorari should be granted.

Respectfully submitted,

MARK H. ADAMS,
A. D. WEISKIRCH,
MANFORD HOLLY,
WILLIAM C. FARMER,
LEONARD LEVAND,
of Wichita, Kansas,
Attorneys for Petitioner.